JAMES E. BRIGGS
v.
BUREAU OF LAND MANAGEMENT
JOHN F. GROSS, JR.

IBLA 85-578 Decided September 25, 1987

Appeals from a decision of Administrative Law Judge Robert W. Mesch affirming in part and reversing in part a decision of the District Manager, Phoenix District Office, Arizona, Bureau of Land Management, which cancelled a grazing preference in part and adjusted the boundary of a grazing allotment. AZ-020-84-01.

Affirmed.

1. Grazing Permits and Licenses: Adjudication -- Grazing Permits and Licenses: Apportionment of Federal Range

   The Board will affirm a decision of an Administrative Law Judge reversing a BLM decision to modify the apportionment of grazing privileges in a BLM-approved rangeline agreement where the agency decision was not based on a consideration of whether there had been a radical change in circumstances by virtue of the unavailability of associated private land for grazing or other factors which would justify a modification.

2. Grazing Permits and Licenses: Adjudication -- Grazing Permits and Licenses: Base Property (Water) -- Grazing Permits and Licenses: Cancellation or Reduction

   BLM properly rejects an application for grazing use within an allotment where grazing is already allocated to a longstanding grazing preference, even though that preference is subject to cancellation because it is no longer supported by appropriate base property, and where BLM affords the holder of that preference an opportunity to apply for the transfer of the preference to other base property.

APPEARANCES: George Read Carlock, Esq., Phoenix, Arizona, for James E. Briggs; Devens Gust, Esq., Phoenix, Arizona, for John F. Gross, Jr.; William H. Swan, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

James E. Briggs, John F. Gross, Jr., and the Bureau of Land Management (BLM) have all appealed from an April 3, 1985, decision of Administrative Law Judge Robert W. Mesch affirming in part and reversing in part a September 19, 1983, decision of the District Manager, Phoenix District Office, Arizona, BLM, which concerned grazing use by Briggs in the Mud Springs allotment and related matters.

This case arose with the issuance to Briggs and Gross of two separate proposed decisions, dated June 22, 1983, in which the District Manager essentially proposed to reestablish the boundary line between the Mud Springs Allotment, containing the grazing preference of Briggs, and the Curtin Allotment, containing the grazing preference of Gross, by transferring certain land situated in secs. 21, 22, 23 (that portion west of highway 93), and sec. 28, T. 22 N., R. 18 W., Gila and Salt River Meridian, Arizona, from the Mud Springs Allotment to the Curtin Allotment. 1/ The June 1983 proposed decisions were issued in response to a March 7, 1979, application by Gross seeking grazing use within the above-described land. In conjunction with transfer of the land, the District Manager proposed to transfer 168 AUM's (animal unit months) from Briggs' grazing preference in the Mud Springs Allotment to Gross' grazing preference in the Curtin Allotment. Finally, the District Manager proposed to require Gross to apply for a transfer of the base property for his grazing preference within the Curtin Allotment from water situated in the W 1/2 sec. 12, T. 21 N., R. 18 W., Gila and Salt River Meridian, Arizona, which was Gross' private land within the allotment as originally configured, 2/ to water within the boundary of the reconfigured allotment.

The District Manager premised the two proposed decisions on his conclusion that Gross had a "rightful claim" to the grazing privileges on the land in secs. 21, 22, 23, and 28 by virtue of the March 23, 1953, decision in Gross v. MacCornack (see note 2), which had, by deciding the water rights question, effectively adjudicated the entitlement of John F. Gross, Gross' father and predecessor-in-interest, to "all of the Federal grazing privileges" within the community allotment of Gross' father and E. A. MacCornack,

---

1/ In addition, the District Manager proposed the deletion from the Curtin Allotment of certain land in the southern portion of the allotment, which land was predominantly private land, including the adjoining private ranches of Briggs and Gross, and which was cut off from the rest of the allotment by a fence constructed in 1977 by BLM.

2/ This water was actually piped from the Willow Spring located in the NW 1/4 NW 1/4 sec. 9, T. 21 N., R. 17 W., Gila and Salt River Meridian, Arizona, to Gross' private land. By decision styled Gross v. MacCornack, 255 P.2d 183 (Ariz. 1953), the Supreme Court of Arizona had affirmed a lower court ruling that Gross' predecessor-in-interest had acquired a prescriptive right to the water from the spring and that Gross was entitled to a perpetual easement to the water and for the water pipeline.

one of Briggs' predecessors-in-interest, which allotment originally encompassed the Curtin Allotment and the land in secs. 21, 22, 23, and 28. The District Manager concluded that Gross was entitled to the use of the land in secs. 21, 22, 23, and 28, notwithstanding an April 24, 1953, "Rangeline Agreement" signed by Gross' father and Edward Brackney, also one of Briggs' predecessors-in-interest. As explained by the District Manager, under that agreement Gross' father and Brackney had agreed to divide the community allotment and thereby establish the individual Curtin allotment in which the grazing preference would be owned solely by Gross' father. The District Manager stated that the parties had further agreed that, in exchange for the use of Brackney's private land within the Curtin Allotment, Brackney would be given the use of the land in secs. 21, 22, 23, and 28. However, the District Manager noted that the subsequent subdivision and sale of Brackney's private land, as well as the 1977 construction by BLM of a fence isolating this land from the rest of the Curtin Allotment, had rendered that land unavailable for grazing by Gross. The District Manager, therefore, concluded that Gross was entitled to the land in secs. 21, 22, 23, and 28 by virtue of his prior entitlement.

By letter dated July 8, 1983, Briggs protested the District Manager's June 1983 proposed decision directed to him, 3/ contending that the decision would violate 43 CFR 4120.1 by altering the boundaries of the two allotments without the preparation of a land-use plan and that Gross was, in any case, not entitled to the Curtin Allotment "as presently constituted," because Gross' base property was separated by more than a mile of private land and a BLM fence from the allotment. In conjunction with his protest, Briggs filed an application for grazing privileges in the Curtin Allotment and concomitant adjustment of the boundaries of the Mud Springs Allotment to include the underlying land. Briggs also argued that the 1953 Rangeline Agreement was irrelevant because Briggs was not a party to the agreement; Briggs' grazing permit was not conditioned on the agreement; the agreement was solely an accommodation between private parties and could not affect BLM-established allotment boundaries; the agreement did not expressly provide for any exchange of grazing use; and the intervening circumstances which made Brackney's private land unavailable for grazing were foreseeable at the time of the agreement.

In his September 1983 final decision directed solely to Briggs, the District Manager sustained the June 1983 proposed decision, overruling each of Briggs' objections. The District Manager concluded that he was not precluded by 43 CFR 4120.1 from adjusting allotment boundaries and modifying grazing permits where the land had been designated for livestock grazing under an existing land-use plan. The District Manager also concluded that Gross owned the requisite base property for the Curtin Allotment, i.e., the water situated in the W 1/2 sec. 12, and that, with the change in the allotment boundaries, Gross would be required to apply for the transfer of his

3/ No protest was filed within the time allowed with respect to the District Manager's June 1983 proposed decision directed to Gross. In the absence of a timely protest, the proposed decision became the final decision of the District Manager, in accordance with the terms of the proposed decision.

base property "to a water within the new area." Finally, the District Manager concluded that under the terms of the 1953 Rangeline Agreement, which were binding on successors-in-interest and expressly provided for an exchange of grazing use, use of the land in secs. 21, 22, 23, and 28 "revert[ed] to the original holder of the Federal grazing preference" in the Curtin Allotment and his successors-in-interest when use of the private land in that allotment was "lost." Accordingly, the District Manager adjusted the boundary of the Mud Springs Allotment, excluding the land in secs. 21, 22, 23, and 28, and reduced Briggs' grazing preference in that allotment by 168 AUM's.

In his September 1983 final decision, the District Manager also rejected Briggs' application for grazing privileges in the Curtin Allotment because Gross, and not Briggs, owned the requisite base property for that allotment. The District Manager also noted that waters proposed by Briggs as base property "are located outside the Curtin Allotment and within the Mud Springs Allotment."

Briggs filed an appeal from the District Manager's September 1983 final decision. The case was assigned to Judge Mesch, who conducted a hearing on November 8, 1984, in Phoenix, Arizona. At the hearing, Judge Mesch permitted Gross to intervene in the proceedings.

In his April 1985 decision, Judge Mesch reversed the District Manager's September 1983 final decision to the extent it provided for the exclusion of land from the Mud Springs Allotment for purposes of transferring that land to the Curtin Allotment, with the concomitant effect on grazing privileges. Judge Mesch held that nothing in the 1953 Rangeline Agreement provided for an exchange of grazing use between the predecessors-in-interest of Briggs and Gross with respect to secs. 21, 22, 23, and 28 and Brackney's private land or provided for a reversion of the former land if use of the Brackney land was lost or "if any other future event should occur" (Decision at 4). Judge Mesch further held that the District Manager, in concluding that the agreement had provided for an exchange, had relied on an "unidentifiable piece of paper" in BLM files which purported to describe the purpose of the agreement and an "unidentifiable notation" on a September 14, 1953, BLM dependent property survey. Id. at 4, 5. Judge Mesch stated that these documents could not be used to expand the meaning of the agreement, which was "clear and unambiguous." Id. at 5.

In reversing the District Manager's September 1983 final decision, Judge Mesch also relied on the fact that the question of whether Gross was entitled to the use of the land in secs. 21, 22, 23, and 28 had been decided by the District Manager in a July 25, 1962, letter, acquiesced in by Gross and that Briggs had operated "for more than 25 years without any knowledge of the claim of [Gross]." Id. at 6, 7. Judge Mesch concluded that, even if the 1953 Rangeline Agreement had provided for an exchange, it would be unfair to transfer approximately 3.5 sections of land to Gross where the evidence established that at the time of the exchange Gross' father only "gave up" two sections of Federal land then open to grazing use. Id. at 7; see Exh. A.

Finally, Judge Mesch affirmed the District Manager's September 1983 final decision to the extent it rejected Briggs' application for grazing privileges in the Curtin Allotment. Judge Mesch concluded that BLM had no authority to recognize other base property where the grazing preference within the Curtin Allotment was already controlled by Gross' base property and that, with the reconfiguration of the allotment, Gross should be permitted to transfer the grazing preference to other base property where he and his family had held the preference "for at least 30 years." Id. at 8.

As noted, Briggs, Gross, and BLM have all appealed from Judge Mesch's April 1985 decision. Together they have raised a number of substantive issues which we will deal with seriatim. However, before proceeding to those issues, there is a procedural issue which must be dealt with.

On May 7, 1985, Gross submitted certain "newly discovered evidence," with a request that Judge Mesch either reconsider his April 1985 decision based on that evidence, supplement the record, or reopen the hearing for the purpose of introducing the evidence. The evidence proffered by Gross consists of a May 6, 1985, affidavit of Gross; a copy of exhibit 2 introduced at the hearing by BLM; a May 3, 1985, affidavit of Elno Roundy, a BLM employee, with various attachments; and a portion of the hearing transcript. This evidence relates largely to Gross' contention that the "unidentifiable piece of paper" referred to by Judge Mesch at page 5 of his decision is an integral part of the 1953 Rangeline Agreement and to Gross' explanation for the lapse of time between his November 14, 1960, letter and the March 7, 1979 application reasserting his claim to grazing use in secs. 21, 22, 23, and 28. On May 7, 1985, BLM also requested Judge Mesch to reconsider his April 1985 decision on the basis of unspecified "newly discovered evidence." 4/ Briggs objected to both requests for reconsideration and/or a reopening of the hearing on the basis that the other parties had not demonstrated what effect the purported newly discovered evidence would have on the result in the case or the reason for its unavailability at the hearing.

In a May 8, 1985, memorandum transmitting the record in this case to the Board, Judge Mesch stated that, in view of the filing of notices of appeal by the parties, he no longer had any jurisdiction to rule on the requests filed by Gross and BLM. We agree. The timely filing of a notice of appeal removed jurisdiction over the case from Judge Mesch, including the authority to act on procedural motions filed by the parties. See Lawrence H. Merchant, 81 IBLA 360 (1984). That authority now resides with the Board.

In reviewing the procedural requests made, we start with the premise that the Board has de novo review authority, i.e., "all the powers which it would have in making the initial decision." 5 U.S.C. § 557 (1982); see United States Fish & Wildlife Service, 72 IBLA 218 (1983); United States v. Dunbar Stone Co., 56 IBLA 61 (1981), aff'd, Dunbar Stone Co. v. United States, Civ. No. CV 81-1271 PHX-EHC (D. Ariz. Feb. 27, 1984), aff'd, 753 F.2d 1081 (9th Cir.), cert. denied, 472 U.S. 1028 (1985). Generally, this includes the

4/ In its statement of reasons (SOR), however, BLM incorporates by reference Gross' request for reconsideration, including the evidence submitted with that request.

authority to take cognizance of evidence submitted for the first time on appeal either for purposes of a decision by the Board or for remanding the case to BLM for an initial decision. See B. K. Killion, 90 IBLA 378 (1986); David A. Provinse, 78 IBLA 85 (1983). The rationale for this authority is simply that the Board is "required to consider all relevant information tendered both by an appellant and by BLM." In re Lick Gulch Timber Sale, 72 IBLA 261, 273 n.6, 90 I.D. 189, 196 n.6 (1983). However, in the case of an administrative hearing, the Board will not ordinarily take cognizance of evidence introduced following the hearing, at which the party submitting the evidence had an opportunity to introduce relevant evidence, except for the purpose of deciding whether a further hearing is warranted. United States v. Rice, 73 IBLA 128, 141 (1983). A request to reopen a hearing for the submission of new evidence will be granted only where the party can demonstrate not only that it had a valid justification for not introducing the evidence at the original hearing but that the newly proffered evidence might be productive of a different result. Ouzinkie Native Corp. v. Opheim, 83 IBLA 225 (1984); United States v. Porter, 37 IBLA 313 (1978). As we observed in United States v. MacIver, 20 IBLA 352, 359 (1975), the principal problem with evidence submitted for the first time on appeal is that it is "not subject to cross-examination."

Here, however, the bulk of the evidence submitted by Gross consists of documents obtained from official records maintained by BLM. 5/ As such, the proffered evidence includes "public records of the Department of the Interior," of which the Board may take official notice. 43 CFR 4.24(b). 6/ Copies of the documents were served on Briggs, who has had an opportunity to challenge their import. Under the circumstances, we see no need to remand this case to the Hearings Division for a further hearing. Instead, we will take cognizance of the documents that constitute "public records of the Department of the Interior" for whatever light they may shed on the issues raised herein.

We turn to the substantive issues raised by this case. The primary issue presented is whether Judge Mesch erred in reversing the District Manager's September 1983 final decision to the extent it provided for the exclusion of secs. 21, 22, 23, and 28 from the Mud Springs Allotment for the purposes of transferring that land to the Curtin Allotment, with the concomitant effect on grazing privileges. In his statement of reasons, Gross essentially contends that he is equitably entitled to grazing privileges within this land, where the 1953 Rangeline Agreement provided for an exchange of grazing use which was not intended by the parties thereto to be permanent

5/ The May 3, 1985, affidavit of Roundy attests to the fact that the documents, which consist of minutes of two meetings of the Advisory Board, Arizona Grazing District No. 2, on Apr. 15 and May 1, 1953, and a May 11, 1949, BLM memorandum, were "contained in official BLM office records."

6/ The only document submitted by Gross for which official notice may not be taken is his own May 6, 1985, affidavit. While the affidavit refers to various facts not previously introduced into the record, we find nothing of any consequence in the document to resolution of this case. In any event, we will not reopen the record merely to permit Gross to testify to these facts.

but rather to continue until there was a change in circumstances. Gross argues that his inability to graze Brackney's private land by virtue of the subdivision and sale of the land and the 1977 construction by BLM of the fence isolating this land from the rest of the Curtin Allotment constituted a change in circumstances and caused the grazing use in secs. 21, 22, 23, and 28 to revert to Gross. In its statement of reasons, BLM joins in Gross' appeal, arguing that the District Manager's September 1983 final decision sought to "strike a balance between the two interests based upon the historical record" and "equitable considerations." Both Gross and BLM characterize Briggs' retention of grazing use within secs. 21, 22, 23, and 28 as a "windfall" (BLM's SOR at 3). See Gross' SOR at 7-8.

In an answer to Gross' SOR, Briggs contends that the case is governed by a clear reading of the 1953 Rangeline Agreement and not the purported intent of the parties thereto. Briggs argues that the agreement constituted a permanent division of the original community allotment and challenges Gross' assertion that the agreement provided for any exchange of grazing use which would then be subject to a change in circumstances. Thus, Briggs argues that there has been no reversion of the grazing use in secs. 21, 22, 23, and 28 to Gross as a result of changed circumstances.

At the outset, we recognize there to be a factual misconception which, as is evident in the District Manager's June 1983 proposed decisions, clouded BLM's adjudication of Gross' application for grazing use within secs. 21, 22, 23, and 28; Gross has perpetuated this misconception on appeal. See Tr. 13-14, 20. The premise for the District Manager's conclusion that Gross had a "rightful claim" to this grazing use was his original conclusion that the Arizona Supreme Court in Gross v. MacCornack, supra, had held that, by virtue of the court's resolution of the water rights question, "John F. Gross was then entitled to all of the Federal grazing privileges within the community allotment." That statement appears in both proposed decisions. On appeal, Gross states: "Since [Willow Springs] was the base water to the Curtin Allotment, this decision terminated the grazing rights of Briggs' predecessor * * * to any federal grazing lands in the Curtin allotment" (Gross' SOR at 4). However, as Briggs points out, this was neither the result nor the effect of the court's decision. See Briggs' Answer at 4-5. That decision only adjudicated Gross' father's right to use the piped-in water from Willow Springs, which was located on MacCornack's private land, as an interest appertaining to his private land in the W 1/2 sec. 12, T. 21 N., R. 18 W., Gila and Salt River Meridian, Arizona. The court expressly declined to rule on the question of whether MacCornack, Briggs' predecessor-in-interest, was himself entitled to access to this piped-in water by virtue of a purported prescriptive right. See Gross v. MacCornack, supra at 187-88. Therefore, the court did not resolve the question of whether MacCornack had base property which continued to support his interest in the community allotment. Cf. W. Doyle Wood, 25 IBLA 261 (1976). Nor is the record sufficient for Board resolution of this question. Moreover, there is no evidence that BLM had, prior to the 1953 Rangeline Agreement, granted Gross' father exclusive grazing privileges in the allotment. See Tr. 23. The allotment's status as a community allotment had not changed. Thus, we must conclude that, at the

time of the 1953 Rangeline Agreement, both Briggs' and Gross' predecessors-in-interest had equal claims to the existing community allotment. 7/ See Homer Smelser v. BLM, 75 IBLA 44, 51 (1983).

A major question presented by this case concerns the meaning of the 1953 Rangeline Agreement, which for all purposes was a binding contract between the parties thereto until changed by mutual consent. BLM v. Spring Creek Ranch, 96 IBLA 4 (1987); BLM v. Wagon Wheel Ranch, Inc., 62 IBLA 55 (1982); Mrs. Dulcie S. Williams, Interior Grazing Decisions 280 (1942). There has been substantial discussion by both Briggs and Gross, as well as Judge Mesch, regarding what constitutes the agreement. Exhibit 2 consists of two pages. The first page, which is not dated or signed, is entitled "Agreement on division of the Gross-Brackney Curtin Community Allotment." That page states in full:

> On April 24, 1953 John F. Gross, and Edward Brackney met at the Gross Curtin Ranch headquarters to work out an agreement on the division of the Gross-Brackney Curtin Community Allotment. The following people met with Gross and Brackney to assist in their reaching an agreement: Jack M. Wilson, Dick Stephens, Clyde C. Cofer, Advisory Board members, Arizona Grazing District No. 2, Ray Van Marter, Lessor of the Gross Allotments, and Jackson M. Phillips, BLM representative.
>
> The agreement reached by Gross and Brackney was that in exchange for the use of the Brackney patented lands that would be located in the Gross individual Curtin Allotment, Brackney would be given the use of sufficient federal lands on the North and Northwest of the original Gross-Brackney community allotment to compensate Brackney for his privately-owned lands.
>
> The Range Line agreed upon and a detailed description of the agreement is shown on the attached township plat.

The second page consists of a township plat which depicts the existing northern and northwestern boundaries of the Curtin Allotment. On the back of that plat is a typewritten agreement dated April 24, 1953, and signed by John F. Gross, Bertha Gross, Edward Brackney, Thelma Brackney, and John F. Johnston, the BLM Area Manager. The agreement provides in full:

> In accordance with the provisions of Section 6(d) of the Federal Range Code, approved September 23, 1942, we, the undersigned hereby agree to the adjustment of our respective range allotment boundaries as shown on this map and further described as follows:

7/ The minutes of an Apr. 15, 1953, meeting of the Advisory Board, Arizona Grazing District No. 2, submitted by Gross, however, indicate that, at the time of entering into the 1953 Rangeline Agreement, Brackney was of the opinion that the court had eliminated his grazing privileges in the community allotment. These minutes state: "Brackney admitted his loss of grazing privileges on the public lands" (Exh. C, Motion for Reconsideration at 3).

> Beginning at the point where the Highway fence, located on the West side of Highway 93 and 466, crosses the Section line common to Sections 23 and 26, T. 22 N., R. 18 W., thence West 1-3/4 mile to the Section corner common to Sections 21-22-27-28, T. 22 N., R. 18 W., thence South one (1) mile; West one (1) mile, thence South one (1) mile; West one (1) mile, thence South to a point where the fence on the North side of the Davis Dam Highway crosses the Section line common to Sections 8 and 9, T. 21 N., R. 18 W.
>
> The Gross Curtin individual allotment will consist of those lands located in the area that is enclosed by the agreed line and the two highway fences to their junctions in Section 8, T. 21 N., R. 17 W. This area is shown on the plat.
>
> It was further agreed that Brackney was not to remove any improvements that might be located on his privately-owned lands now located in the Gross Curtin individual allotment.
>
> It is further agreed that the above described allotment boundary constitutes a fair, equitable and practical range division and as such shall be binding upon our respective heirs, executors, administrators, successors in interest or assigns.

Id.

Judge Mesch concluded that the first page of exhibit 2 could not be read to "enlarge" upon the meaning of the second page, characterizing it as an "unsigned, undated, and unidentifiable piece of paper that by some unknown means and at some unknown time found its way into the BLM files" (Decision at 5). Gross argues at length that the two pages constitute one document, while Briggs argues they do not.

We are not persuaded by the evidence that the two pages constitute one document. We note that the first page refers to the "attached township plat" (Exh. 2). This indicates that at some time the first page was attached to the second page of exhibit 2. However, this does not establish that the parties signing the 1953 Rangeline Agreement intended to incorporate the first page into the agreement. Indeed, we find no statement in the agreement referring to that first page. Moreover, there is simply no evidence that the two pages were "executed at the same time, by the same parties, for the same purpose [or] in the course of the same transaction." Maier v. Continental Oil Co., 120 F.2d 237, 240 (7th Cir. 1941), cert. denied 314 U.S. 652 (1941); cf. Evart Jensen, 5 IBLA 96 (1972). We, therefore, decline to consider the two pages of exhibit 2 as one integrated document, even though they were attached at the time they were retrieved from BLM's files. See Tr. 30.

Nevertheless, having said that, we do not regard the first page of exhibit 2 as shedding no light on the meaning of the 1953 Rangeline Agreement. That page purports to describe the April 24, 1953, meeting which led to the agreement at which the parties agreed that Brackney would have the use of land in the "North and Northwest" of the community allotment in return

for Gross' father's use of Brackney's private land within the newly created Curtin Allotment (Exh. 2). The agreement, indeed, separates this northern and northwestern area from the newly created Curtin Allotment. In addition, the agreement precludes Brackney from removing any improvements from his private land. This suggests that such improvements were to be reserved for use by Gross' father.

Apart from exhibit 2, exhibit 3 is a BLM dependent property survey, dated September 14, 1953, with respect to Brackney, which states, as to secs. 21, 22, 23, and 28: "Compute this land as controlled land instead of Federal land because of exchange of use for patent land in Gross allotment." This statement is the "unidentifiable notation" which Judge Mesch would not permit to "enlarge" upon the meaning of the 1953 Rangeline Agreement (Decision at 5). We do not agree that the notation is not identifiable. It is part of a signed and dated document prepared by a BLM employee and appears to be in the same handwriting as all of the other entries on the form. See Tr. 39, 83. It was obviously made by a BLM employee for BLM purposes and contributes to our understanding of BLM's interpretation of the agreement. In addition, Gross submitted minutes of two meetings of the Advisory Board, Arizona Grazing District No. 2. In an April 15, 1953, meeting, Brackney is stated as suggesting some arrangement "such as exchange of use or otherwise for [his private land whereby he would] * * * be given an acreage of public land blocked off in the north end of the [community] allotment comparable to his patented lands in the south end of the allotment" (Exh. C, Motion for Reconsideration at 3). The minutes further state:

> When approached with Mr. Brackney's desire, Mr. Gross stated he would not agree to such an arrangement without going over the area on the ground. Therefore it was the Board's recommendation that a committee be appointed by the Board Chairman to accompany both Mr. Gross and Mr. Brackney to the area in the near future and see what could be worked out.

Id. Minutes of a May 1, 1953, meeting of the Advisory Board merely indicate that a "division" of the community allotment had been worked out and signed by Brackney and Gross. Id. at 9. While not conclusive, all of this evidence strongly suggests that Gross' father's use of Brackney's private land constituted consideration for the express division of the community allotment in the 1953 Rangeline Agreement whereby Brackney acquired the use of secs. 21, 22, 23, and 28.

However, even assuming that use of Brackney's private land was the unexpressed consideration for the agreement, we agree with Judge Mesch that the subsequent loss of that use does not necessarily result in a reversion of the use of secs. 21, 22, 23, and 28 from Brackney's successor-in-interest to Gross' father's successor-in-interest. While the agreement was binding on successors-in-interest, it made no provision for what would happen in the event of "[loss of] the use of the Brackney private lands or * * * any other future event" (Decision at 4). In such circumstances, we will not attempt to decide what the intent of the parties to the agreement, including BLM, might have been. Moreover, we will not read language providing for a reversion of the grazing use in secs. 21, 22, 23 and 28 to Gross' father's successor-in-interest into an agreement where no such language appears. See A. D. Findlay,

29 IBLA 262, 269 (1977). 8/ We do not regard loss of the use of Brackney's private land as operating as a constructive condition subsequent which causes the reversion of the grazing use in secs. 21, 22, 23, and 28 to Gross under equitable principles of contract law. See Williston on Contracts, Third Edition, Section 887AA (1962); Corbin on Contracts, Sections 632, 739 (1960).

In addition, we recognize that the situation herein is not unlike that where BLM has expressly approved an exchange-of-use agreement whereby a livestock operator grants BLM "management and control" of his private land for grazing purposes, which land is "interspersed and normally grazed in conjunction with the surrounding Federal range," in return for the right to graze on the Federal range. Alton Morrell & Sons, 72 I.D. 100, 107 (1965); see also Charles E. Kunzler, Interior Grazing Decisions 450 (1946). 9/ In David Abel, supra at 102, we concluded that, as an "elementary principle," those Federal grazing privileges granted to a livestock operator under an exchange-of-use agreement would terminate where the operator subsequently reclaimed the use of his private land. We do not find it appropriate to follow this standard in deciding whether Briggs' Federal grazing privileges in secs. 21, 22, 23, and 28 should be terminated. The overriding question is what action "will result in a fair and equitable division of the range between the parties and promote the best use of the area in a manner consistent with good range management." Charles E. Kunzler, supra at 453. Application of the principle followed in David Abel, supra, simply fails to take into account any other circumstances which may have changed since the purported exchange-of-use agreement was entered into. In particular, we note that a considerable period of time has elapsed since the agreement herein was allegedly made, unlike the situation in Abel.

[1] In resolving the question regarding division of the range, we start with the 1953 Rangeline Agreement. Generally speaking, we recognize that rangeline agreements "do not create any vested rights to the continued use of the Federal range" and that BLM may cancel or modify such agreements in the interest of proper range management. Wayne M. Whitehill, Interior Grazing Decisions 486, 489 (1947). This is consistent with "Section 6(d)

8/ In A. D. Findlay, supra at 269, we quoted with approval a statement by Judge Mesch that the Department would not undertake construction of a rangeline agreement because it involved "'matters of private contract dispute.'" This statement seems to indicate that the Department is not at all concerned with the proper construction of a rangeline agreement. However, BLM is a party to such an agreement. See 43 CFR 161.1(c) and 161.6(d) (1949); Robert E. Boyd, Interior Grazing Decisions 414 (1945); Bolten & Davis Livestock Co., 58 I.D. 193, 198 (1942). Thus, it is proper for the Department to consider BLM's intent in approving the agreement.

9/ Such an agreement permits BLM to exercise a "degree of dominion" over the private land, in order to protect the Federal range. David Abel, 2 IBLA 87, 95 (1971). Provision for such exchange-of-use agreements is now codified at 43 CFR 4130.4-1. Prior to that codification, the Board was willing to recognize oral agreements where there was sufficient proof thereof. David Abel, supra at 98 n.10; Lloyd Pewonka, 8 IBLA 303 (1972).

of the Federal Range Code," mentioned in the 1953 Rangeline Agreement (Exh. 2), which merely stated that "divisions of the range by agreement * * * will be respected and followed where practicable." 43 CFR 501.6(d) (7 FR 7687 (Sept. 29, 1942)). However, the Acting Assistant Secretary also stated in Whitehill that the Department would, with certain exceptions, generally recognize rangeline agreements as effective between the parties. Specifically, he stated:

> Unless the public interest or the needs of governmental administration require modification of the boundary line or withdrawal of some or all of the lands from a particular permittee or licensee, these range-line agreements are generally recognized by this Department as effective between the parties, unless it is clearly shown that force or coercion was used in effecting the range-line agreement, or that rescission of the contract is warranted, or that radical changes have occurred which merit a reconsideration of the range line, or the parties themselves agree on a modification. [Footnote omitted.]

Wayne M. Whitehill, supra at 490. In Whitehill, the Acting Assistant Secretary found no "radical" change in circumstances where the parties seeking revision of the rangeline agreement (the Whitehills) were merely excluded from the allotment of the other party to the agreement (Wilson), by virtue of construction of a fence along the common boundary of the allotments of the parties, as that boundary was denoted in the agreement. The Acting Assistant Secretary concluded:

> It thus appears that the only change in circumstance, on the basis of which the Whitehills are now seeking the additional Federal range here involved, is the fact that the range line has recently been fenced so as to exclude their cattle. But since the lands have been within the allotment of Wilson, the Whitehills have had no right to allow their cattle to graze these lands, and the fact that their cattle have grazed for several years on the lands here involved gives them no additional rights thereto since such grazing has been in trespass. [Footnote omitted.]

Wayne M. Whitehill, supra at 490.

Likewise, we do not regard the loss of the use of Brackney's private land subsequent to 1953 by subdivision and sale and the 1977 construction by BLM of the fence isolating that land from the rest of the Curtin Allotment as a radical change in circumstances which requires BLM to intercede on behalf of one of the parties to the 1953 Rangeline Agreement (or his successor-in-interest) to the detriment of the other party (or his successor-in-interest). The record supports the conclusion that there has been a gradual change in circumstances. In his statement of reasons, Gross states that it was not until 1960 that he was excluded from approximately half of Brackney's private land and not until 1977 that he was excluded from all of the land (Gross' SOR at 5). There is no evidence that this change has had

any significant impact on the extent of Gross' grazing use. At the November 1984 hearing, he testified only that it has caused him to move his operations north of the fence line (Tr. 131). Moreover, in the meantime, Briggs and his predecessors-in-interest have had the use of secs. 21, 22, 23, and 28.

In approving rangeline agreements, it has been the policy of at least one BLM area office to consider those factors applicable to allocating grazing use between conflicting applicants. See BLM v. Wagon Wheel Ranch, Inc., supra at 59. These factors, as currently set forth at 43 CFR 4130.1-2, are historical use of the public lands, proper range management and use of water for livestock, general needs of the applicant's livestock operations, public ingress or egress across privately owned or controlled land to public lands, topography, and other land-use requirements unique to the situation. (Regarding application of these criteria see generally John Rattray, 36 IBLA 282 (1978); Jose Antonio Sanchez, 17 IBLA 195 (1974); John Ringheim, 10 IBLA 270 (1973); Victor Powers, 5 IBLA 197 (1972)). We conclude that these factors also provide a useful framework for reviewing rangeline agreements, whether in deciding to approve a proposed agreement or to modify an existing one because of a radical change in circumstances. In the present case, we do not perceive that these factors favor modification of the 1953 Rangeline Agreement to the benefit of Gross and the detriment of Briggs. In particular, the record does not demonstrate that Gross is incapable of satisfying his authorized grazing demand without the addition of secs. 21, 22, 23, and 28 to the Curtin Allotment. See W. Dalton La Rue, Sr., 9 IBLA 208, 213 (1973), aff'd, La Rue v. United States, Civ. No. R-2827 (D. Nev. Mar. 12, 1974), aff'd, 538 F.2d 336 (9th Cir.), cert. denied, 429 U.S. 920 (1976). To the contrary, our reading of the record indicates that the regulatory factors, particularly as to historical use, favor a continuation of the agreement. This in itself argues in favor of affirmation of the Administrative Law Judge's decision. Cf. R. A. Malesich, 13 IBLA 199 (1973).

In any case, in his September 1983 final decision, the District Manager based his conclusion that the use of secs. 21, 22, 23, and 28 should revert to Gross solely on the basis that it was "logical." See Tr. 58. On appeal, BLM characterizes the decision as an attempt "to strike a balance between the two interests based upon the historical record" (BLM's SOR at 3). However, there is no evidence that the District Manager considered whether there had been a "radical" change in circumstances or any of the other factors outlined in Whitehill which would justify a modification of the 1953 Rangeline Agreement. The virtual absence of any valid explanation for the District Manager's decision persuades us that the decision lacks a rational basis or is unreasonable and that, as such, Judge Mesch properly reversed the decision. See 43 CFR 4.478(b); Boyd L. Marsing, 18 IBLA 197, 199-200 (1974).

We do not mean to suggest that BLM does not have the authority to adjust the boundary between the Mud Springs and Curtin allotments in order to achieve a proper apportionment of the Federal range which is reflective of the loss of the use of Brackney's private land, where use of that land entered into the original grazing use allocation established by the BLM-approved rangeline agreement. BLM has that authority. See 43 CFR 4110.2-2(d); Newell A. Johnson, 70 I.D. 369 (1963); W. Dalton La Rue, Sr., A-30391 (Mar. 16, 1966). What is not permissible is for BLM to reapportion

the Federal range in a manner which fails to demonstrate a reasoned consideration of applicable factors, including whether there has been a "radical" change in circumstances which compels a deviation from the rangeline agreement.

Where the change in circumstances concerns private land which was not the express subject of the rangeline agreement, we start with the premise that BLM is the administrator of grazing use on the "Federal range," which at the time of the 1953 Rangeline Agreement was defined as "land owned, leased or otherwise controlled by the United States." 10/ 43 CFR 161.2(c) (1949). The Federal range does not include State or privately-owned land. Jose M. Apodaca, Interior Grazing Decisions 256 (1941). 11/ As such, BLM is generally obligated to ensure that parties to a BLM-approved rangeline agreement allocate the Federal range in a manner which is fair and in substantial compliance with the Federal Range Code. 43 CFR 161.1(c) (1949); Orlo G. Bailey, A-29671 (Nov. 23, 1964). Thus, where there has been a change in circumstances whereby a portion of allocated Federal range is no longer available for grazing use, e.g., by withdrawal or otherwise, arguably there may have been a "radical" change of the sort envisioned in Whitehill which would justify a reallocation by BLM, if the parties were unable to agree to a modification of the agreement. See 43 CFR 4110.4-2(a); Jose M. Apodaca, supra. It, therefore, might be argued that where the change in circumstances concerns private land not subject to a BLM-approved rangeline agreement, but subject to a separate understanding between the private parties outside the context of the agreement, we should not regard this as the sort of "radical" change envisioned in Whitehill because BLM is not in the business of deciding what is a fair allocation of the private range. That itself would generally be a matter of private contract dispute which is for the courts and not the Department to resolve. 12/ A. D. Findlay, supra at 269.

However, as the present case illustrates, a separate understanding between the private parties to a BLM-approved rangeline agreement may constitute the unexpressed consideration for that agreement. Moreover, BLM may have taken that understanding into account when deciding to approve the agreement. Indeed, it is proper for BLM to take into account the amount and quality of private range available to the private parties in determining the proper and equitable apportionment of the Federal range. See BLM v. Wagon Wheel Ranch, Inc., supra at 60-61; United States v. Maher, 5 IBLA 209,

---

10/ Under current regulations, the authority of BLM extends only to "[p]ublic lands," which are defined as lands "owned by the United States." 43 CFR 4100.0-5. See Homer Smelser v. BLM, supra at 54.

11/ In Jose M. Apodaca, supra at 258, the appellant had applied for grazing use on Federal range which was "cut * * * off from his livestock waters" by virtue of the intervenor's acquisition of grazing rights in State and privately owned lands. In this respect, the First Assistant Secretary concluded: "[A]s they are lands over which the Government has no control, there is nothing this Department can do to alter the situation." Id.

12/ Indeed, Gross recognizes that he has, in any case, a "damage suit against Briggs or his predecessors who sold [Brackney's private] land without excepting the grazing rights of Gross" (Gross' SOR at 14).

79 I.D. 109 (1972); Leo Sheep Co., A-27424 (May 7, 1957). In this fashion, BLM pays heed to the "[g]eneral needs of the [party's] livestock operations." 43 CFR 4130.1-2(c). Thus, we conclude that it is also proper for BLM to consider modification of a rangeline agreement where there has been a change in circumstances regarding such private land. However, as this case also demonstrates, this kind of call by BLM is made difficult because of problems of proof. Particularly, the evidence must establish that a separate understanding regarding the use of private land was reached between the private parties and that this understanding formed the basis for not only the private parties' decision to enter into the agreement, but also BLM's decision to approve the agreement. The evidence herein is by no means conclusive in this regard. Moreover, the evidence must establish that the change in circumstances has fundamentally altered the original purposes which the agreement sought to achieve. As previously noted, the evidence here does not rise to that level.

We therefore conclude that the loss of the use of Brackney's private land did not constitute a radical change of circumstances and that the record does not establish any other factor which justified a reapportionment of that portion of the Federal range long used by Brackney and his successors-in-interest in favor of Gross' father and his successor-in-interest. Thus, we hold that Judge Mesch properly reversed the District Manager's September 1983 final decision to the extent it provided for the exclusion of secs. 21, 22, 23, and 28 from the Mud Springs Allotment for the purposes of transferring that land to the Curtin Allotment, with the concomitant effect on grazing privileges. 13/

We are obliged to rule on the legal effect of the July 25, 1962, letter of the District Manager. By letter dated November 14, 1960, Gross notified BLM that he had lost the use of Brackney's private land through subdivision and sale and stated: "So at this time I would like to put in application to bring my grazing capacity to original allotment before this [rangeline] agreement was made" (Exh. 4). In his July 1962 letter, the District Manager took the position that the agreement had made no provision "for the modification of your allotment due to any subsequent changes that might be effected in the land ownership" (Exh. 5). He concluded: "We believe that the above explanation will clarify this matter for you; however, in the event that there are additional questions, please do not hesitate to stop in the office for further explanation." Id. There is no evidence that Gross took any action in response to that letter.

Judge Mesch, while recognizing that Gross was not barred from thereafter raising the matter of his entitlement to grazing privileges in the

13/ There has been a certain amount of discussion in this case regarding whether Briggs was a bona fide purchaser for value of grazing privileges in secs. 21, 22, 23, and 28, without knowledge of the 1953 Rangeline Agreement. In his April 1985 decision at page 7, Judge Mesch so characterized Briggs and concluded that in such circumstances it would not be "fair" to make him, and not Gross, "suffer the consequences" of the loss of the use of Brackney's private land. However, we do not decide the case on that basis.

original community allotment, nevertheless concluded: "[T]here should be some finality to administrative actions, and, in particular, where the rights and interests of third parties are involved. Under the circumstances, I do not believe it was proper to consider and readjudicate a matter in 1983 that had been adjudicated in 1962" (Decision at 6). Judge Mesch characterized the July 1962 letter as a "final adverse administrative adjudication." Id. at 7. Both BLM and Gross argue that Judge Mesch erred in giving res judicata effect to the July 1962 letter which decided nothing and failed to advise Gross of his appeal rights as required by 43 CFR 161.9(c) (1962), and where Gross' entitlement accrued at a later date. We do not regard the July 1962 letter as a "final decision" of the District Manager which was subject to appeal. 43 CFR 161.10(a) (1962). It merely advised Gross of the District Manager's position and did not grant a right of appeal. Compare Evart Jensen, supra, with Midland Livestock Co., 10 IBLA 389, 409-10 (1973). Accordingly, the Department was not barred by virtue of the doctrine of administrative finality, the administrative counterpart of res judicata, from considering Gross' entitlement in the context of the present appeal. See 43 CFR 4.470(b); Village of South Naknek, 85 IBLA 74 (1985); Beryl Shurtz, 4 IBLA 66 (1971). 14/

Finally, we reach the question of whether Briggs is entitled to all of the grazing privileges within the Curtin Allotment by virtue of Gross' purported loss of his base property. We start with the familiar principle that a BLM adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with Departmental regulations regarding grazing. 43 CFR 4.478(b); Ruskin Lines, Jr. v. BLM, 76 IBLA 170 (1983); John Espil, 65 IBLA 231 (1982) (BLM rejection of grazing application); Bert N. Smith v. BLM, 48 IBLA 385 (1980).

In his September 1983 final decision, the District Manager rejected Briggs' application because Gross, and not Briggs, owned the base property for the Curtin Allotment. The District Manager also concluded that Briggs did not own or control appropriate base property where his purported base property was "located outside the [Curtin] Allotment and within the Mud Springs Allotment." Judge Mesch sustained this decision, concluding that BLM had no authority to recognize other base property for the Curtin Allotment until the grazing preference in that allotment was removed from the existing base property "by transfer or cancellation" (Decision at 8). He also concluded that BLM properly gave Gross an "opportunity" to transfer his grazing preference to other base property upon the reestablishment of the southern boundary of the Curtin Allotment. Id.

14/ Gross also argues that Judge Mesch should have dismissed Briggs' original appeal where he failed to file a posthearing brief. We disagree. There is no Departmental regulation providing for dismissal in such circumstances. Indeed, the submission of a posthearing brief is not mandatory. See 43 CFR 4.474(c). Moreover, an administrative law judge is required to render a decision "on the record" after the time allowed for submitting briefs has ended. 43 CFR 4.475(a).

On appeal, Briggs contends that he, and not Gross, has appropriate "base property" for the Curtin Allotment, as that term is defined in 43 CFR 4100.0-5. That regulation defines base property to include "water that is suitable for consumption by livestock and is available and accessible, to the authorized livestock when the public lands are used for livestock grazing." 43 CFR 4100.0-5. Briggs argues that his base water is accessible even though it is within the Mud Springs Allotment, whereas Gross' base water in the W 1/2 sec. 12 is no longer accessible by virtue of the 1977 construction of the fence by BLM across the Curtin Allotment.

We agree with Briggs that Gross' existing grazing preference within the Curtin Allotment is no longer supported by appropriate base property where the water in the W 1/2 sec. 12, although still within the allotment, is not "available and accessible" to the livestock in the rest of the Curtin Allotment. See Tr. 119. That situation has persisted since the 1977 construction by BLM of the fence isolating this land. However, there is no Departmental regulation which specifically governs what should happen in the event that a grazing preference is no longer supported by appropriate base property because the base water has become unavailable and/or inaccessible. 15/ Nevertheless, we conclude that a grazing preference which is no longer supported by water base property is held in violation of 43 CFR 4110.1 and, thus, the preference holder's grazing permit or lease is subject to cancellation pursuant to 43 CFR 4130.6-1(b). See also 43 U.S.C. § 1752(a) (1982); Earl C. Presley, 60 I.D. 290 (1949). However, we agree with Judge Mesch that until the grazing preference of Gross in the Curtin Allotment is transferred (see 43 CFR 4110.2-3) or cancelled, BLM has no authority to recognize other base property owned or controlled by Briggs as the basis for grazing privileges in that allotment. Cf. Joseph Rebich, A-27491 (Jan. 13, 1958).

[2] Rather than canceling Gross' grazing preference in the Curtin Allotment, BLM offered Gross an opportunity to transfer his grazing preference to other base property pursuant to 43 CFR 4110.2-3. As supported by Judge Mesch, that opportunity was afforded in recognition of Gross' family's longstanding use of the Curtin Allotment and "in order to preserve [their] livestock operation" (Decision at 8). We can find nothing in Departmental regulations which precludes BLM from taking such action even where it has the effect of perpetuating a grazing preference which properly should have been cancelled. Moreover, we conclude that it is consonant with the tenet of section 3 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315b (1982), that, where not otherwise inconsistent with that statute, "grazing privileges recognized and acknowledged shall be adequately safeguarded." See Hatahley

15/ Prior to Aug. 4, 1978, Departmental regulations had long provided what would happen in the event a holder of grazing privileges lost ownership or control of base property with respect to the "continued effectiveness" of a grazing permit or license. 43 CFR 4115.2-1(e) (1977); see Jimmie & Leona Ferrara, 47 IBLA 335 (1980). However, that provision has been deleted from the regulations. See 43 FR 29058 (July 5, 1978). By proposed rules published May 20, 1987, BLM advocates reinstating regulatory requirements in this subject area, among others. 52 FR 19032, 19035.

v. United States, 351 U.S. 173, 177 (1956). It also conforms to one of the avowed purposes of the applicable Departmental regulations, i.e., to provide for the "stabilization of the livestock industry dependent upon the public range." 16/ 43 CFR 4100.0-2; cf. Ray Pershall v. BLM, 80 IBLA 168 (1984); Edward Grady, 18 IBLA 104 (1974); Porter Estate Co., A-30817 at 8 (Dec. 2, 1968).

In Homer Smelser v. BLM, supra, we essentially affirmed a BLM decision rejecting an application for exclusive grazing privileges within certain community allotments. We affirmed in part on the basis that the applicant had "no right to demand any particular area of use or to complain about the grazing privileges of others," where he had received all of the grazing privileges to which he was entitled. Id. at 51; see also C. A. George, A-27488 (Nov. 7, 1957). As in the present case, there was no evidence that the applicant had not been granted his "full rights." Homer Smelser v. BLM, supra at 51; see James E. Briggs v. BLM, 75 IBLA 301 (1983); Fred E. Buckingham, 72 I.D. 274, 277-78 (1965). In Smelser, we also affirmed on the basis that the BLM decision was reasonable and consistent with applicable regulations "to the extent that it denied appellant's application because of the long term existence of other permittees within the long-established community allotments." Homer Smelser v. BLM, supra at 51. Likewise, in the present case, we conclude that allowing Gross to perpetuate his longstanding grazing preference, even at the expense of a conflicting applicant, is reasonable and consistent with 43 CFR 4100.0-2. 17/

Finally, Briggs has not demonstrated that any of the factors set forth in 43 CFR 4130.1-2 with respect to conflicting applications argue, by analogy, in favor of according the grazing preference in the Curtin Allotment to Briggs, rather than Gross. See Charles A. Mitchell, Jr., 30 IBLA 1, 6 (1977). We perceive the opposite to be the case, especially as it relates to historical use and the general needs of Gross' livestock operations.

16/ At one time this aim of stabilization was embodied in 43 CFR 4115.2-1(e)(13)(i) (1977), which barred any "readjudication" of a license or permit, with respect to base property qualifications, at the behest of "any applicant or intervener * * * where such qualifications * * * and license or permit has issued for a period of three consecutive years or more." See Phil J. Hillberry, 24 IBLA 283 (1976); Phil Hillberry, 8 IBLA 428 (1972). That regulation would probably have barred readjudication of Gross' grazing privileges in the Curtin Allotment at Briggs' behest. See Eldon L. Smith, 6 IBLA 166 (1972). However, that provision has been deleted from the regulations. See 43 FR 29058 (July 5, 1978).

17/ Briggs' application is apparently supported by appropriate base property, regardless of the fact that it is within the Mud Springs Allotment. See Tr. 122-23. We note that the definition of base property in 43 CFR 4100.0-5 does not differentiate such property on the basis of whether it is located within or outside the allotted area of the grazing preference applied for. Nevertheless, it is possible Briggs' application, which arose solely in the context of this case, is merely an attempt to fend off Gross' application for grazing privileges within Briggs' allotment.

See Tr. 131; The Corporation of the Great Southwest, 69 IBLA 333 (1982); Frederick & Nida Gorwill, 17 IBLA 13 (1974).

We note that, at the November 1984 hearing, Elno Roundy testified that Gross had applied for a transfer of his grazing preference to other base property in September 1984, and that the application was pending right-of-way approval from the county (Tr. 115-16). In his May 6, 1985, affidavit, Gross states that since the November 1984 hearing he has been granted a right-of-way by Mohave County and has constructed a water pipeline "from my ranch headquarters to section 35, township 22 north, range 18 west so now Curtin base waters are available to livestock inside the Curtin Allotment" (Exh. A, Motion for Reconsideration at 2). We express no opinion on the validity of Gross' application for the transfer of his grazing preference. Henceforth, BLM should act on the application.

Therefore, we conclude that Judge Mesch properly sustained the District Manager's September 1983 final decision to the extent it rejected Briggs' application for grazing privileges within the Curtin Allotment.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1., the decision appealed from is affirmed.

Wm. Philip Horton
Chief Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Will A. Irwin
Administrative Judge